COM/CXW/mnt **ALTERNATE DRAFT**

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Ratesetting

Decision **ALTERNATE PROPOSED DECISION OF COMMISSIONER WOOD (Mailed 4/8/03)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.	Rulemaking 02-01-011 (Filed January 9, 2002)

(See Decision 02-11-022 for a list of appearances.)

ORDER ADDRESSING CONTINUATION of ARRANGEMENTS FOR DIRECT TRANSACTIONS, Including the "SWITCHING EXEMPTION"

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ORDER ADDRESSING CONTINUATION of ARRANGEMENTS FOR DIRECT TRANSACTIONS, Including the "SWITCHING EXEMPTION"

Today's decision reiterates and clarifies our rules regarding the rights and obligations of utility customers to engage in direct transactions[1] or continue direct access (DA) arrangements following the Legislature's suspension of DA on September 20, 2001. This includes consideration of the legality of the so-called "switching exemption" pursuant to the rehearing of Decision (D.) 02-03-055 granted by D. 02-04-067.

We confirm our prior decisions providing for continuation of direct access, including assignment and renewal involving designation of a new electric service provider (ESP), where a pre-September 20, 2001 contract provides for continuation. We specifically reject a proposed "switching exemption"[2] which would permit certain customers to flip between bundled service and direct access, after the September 20, 2001 suspension. That proposal does not comport with Water Code 80110, the Legislature's suspension of the right to acquire electric service from other providers. It would exacerbate the problems created by our decision in D.02-11-022 capping DA customer payments for power costs – the cost recovery surcharge or CRS -- at a level that severely impacts bundled electric

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[1] Pub. Util. Code section 331(c) defines "direct transaction" as "…a contract between any one or more electric generators, marketers, or brokers of electric power and one or more retail customers providing for the purchase and sale of electric power or any ancillary services." Direct transactions are the subject matter of "direct access" service.

[2] The term was first used in D.02-04-067, the order on rehearing that gives rise to this Decision.

customers. As we have previously ruled on three separate occasions,[3] we will provide for continuation of DA service for customers of the utilities and DWR where those customers (1) had a pre-suspension contract with an express provision addressing renewal and/or assignment and (2) have not terminated direct transactions through a resumption of bundled service. We clarify that the resumption of bundled service terminates DA service, whether it occurred prior to September 20, 2001 or afterwards.

The right of electric customers to engage in direct transactions -- direct access -- is a statutory program that has been suspended by the Legislature upon the issuance of an order of the Commission pursuant to the legislative directive. Attempts to revive it or extend it should be addressed to the Legislature.

I. Background

A. Direct Transactions and the Energy Emergency

DA service was authorized as part of California's electric restructuring program in the late 1990's, whereby retail electricity customers were permitted to choose the entity from which they purchase the energy portion of electric service. Customers could receive "bundled" service from the public utility authorized by franchise, statute and Commission order to serve them; or they could contract for DA service from an electric service provider (ESP). Customers who purchase bundled service pay an electricity charge to cover the utility's power supply costs. Bundled service customers' total bill includes charges for all utility services, including distribution and transmission as well as electric energy. A DA customer receives distribution and transmission service from the

[3] D.01-09-060, D.01-10-036 and D.02-03-055

utility, but purchases electric energy from an electric service provider (ESP). See generally, *Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, D.97-05-040, 72 CPUC 2d 441 (1997) and D.97-10-087, 76 CPUC 2d 287 (1997).

The Legislature authorized acquiring electric energy through direct transactions reflecting to these arrangements, Pub. Util. Code sections 365(b) and 366, added by Chapter 854, Stats. 1996 (AB 1890 (Brulte), hereafter "AB 1890"). D.97-05-040, Conclusions of Law 1, 6, 12; 72 CPUC 441, 492 (1997).[4] In AB 1890 the Legislature created a limited exemption from utility status for ESPs who offer direct transactions. Pub. Util. Code sections 216(h) (formerly numbered 216(i)), 218.3 and 394(f). The Commission's implementation of the relationships among customers, utilities and ESPs is generally contained in Rule 22 of the tariffs of Pacific Gas and Electric Company, and Southern California Edison Company, and Rule 25 for San Diego Gas and Electric Company, respectively.[5] DA

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[4] Legal questions about the authority of the Commission to provide for retail wheeling , or direct access, were unresolved at the time AB 1890 was enacted, and were considered moot afterward. *Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation,* D.95-12-063, 64 CPUC 2d 1, 147 (1995); Order on rehearing, D.97-02-021, 71 CPUC 2d 18, 51-52. As against a federal pre-emption argument, the Commission asserted primary and exclusive state authority to provide for retail service, including retail direct access, and found the legislature's action in AB 1890 to be such an action. 71 CPUC 2d 18, 34-38 and footnote 6.

[5] D.97-10-087, 76 CPUC 2d 287 (1997) generally approved Direct Access Implementation Plans for the utilities, approved pro forma tariffs and established the Rule 22 Tariff Review Group to devise and implement the final form of Rule 22. D.97-10-086, Ordering Paragraph 11, 76 CPUC 2d 287, 335-36. The current texts of these rules for the respective utilities may be found at: http://www.sce.com/NR/sc3/tm2/pdf/Rule22.pdf (SCE, Rule 22); http://www.pge.com/customer_services/business/tariffs/pdf/ER22.pdf

service became available on April 1, 1998 and was available to customers until suspended on September 20, 2001.

Pursuant to the Governor's Proclamation of January 17, 2001,[6] Senate Bill 7 (Burton) and Assembly Bill 1 (Keeley, et al.) from the First Extraordinary Session of 2001-02[7], the California Department of Water Resources (DWR) was authorized to procure electricity on behalf of the customers of the public utilities regulated by the Commission, as part of the State's response to the Energy Emergency. In AB 1X the Legislature also directed the Commission to set a date for the "suspension" of DA, at a point in time after the passage of the bill as determined by the Commission. Water Code section 80110.

That statute articulates a broad policy approach to rate recovery of DWR costs. It provides in pertinent part:

> 80110. The department shall retain title to all power sold by it to the retail end use customers. The department shall be entitled to recover, as a revenue requirement, amounts and at the times necessary to enable it to comply with Section 80134,[8]

(PG&E, Rule 22); http://www.sdge.com/tm2/pdf/ERULE25.pdf (SDG&E, Rule 25).

[6] On January 17, 2001, Governor Davis issued a Proclamation concerning a "state of emergency" within California resulting from dramatic wholesale electricity price increases.

[7] This bill was enacted as Chapter 4 of the First Extraordinary Session of 2001-02, effective January 31, 2001. It will be referred throughout as AB 1X.

[8] Section 80134 specifies the categories of cost that are included in the revenue requirement. These are: "(1) The amounts necessary to pay the principal of and premium, if any, and interest on all bonds as and when the same shall become due. (2) The amounts necessary to pay for power purchased by it and to deliver it to purchasers, including the cost of electric power and transmission, scheduling, and other related expenses incurred by the department, or to make payments under any other contracts, agreements, or obligations entered into by it pursuant

> and shall advise the commission as the department determines to be appropriate. Such revenue requirements may also include any advances made to the department hereunder or hereafter for purposes of this division, or from the Department of Water Resources Electric Power Fund, and General Fund moneys expended by the department pursuant to the Governor's Emergency Proclamation dated January 17, 2001. For purposes of this division and except as otherwise provided in this section, the Public Utility Commission's authority as set forth in Section 451 of the Public Utilities Code shall apply, except any just and reasonable review under Section 451 shall be conducted and determined by the department…. In no case shall the commission increase the electricity charges in effect on the date that the act that adds this section becomes effective for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of existing baseline quantities, until such time as the department has recovered the costs of power it has procured for the electrical corporation's retail end use customers as provided in this division. <u>After the passage of such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers shall be suspended until the department no longer supplies power hereunder.</u> The department shall have the same rights with

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hereto, in the amounts and at the times the same shall become due. (3) Reserves in such amount as may be determined by the department from time to time to be necessary or desirable. (4) The pooled money investment rate on funds advanced for electric power purchases prior to the receipt of payment for those purchases by the purchasing entity. (5) Repayment to the General Fund of appropriations made to the fund pursuant hereto or hereafter for purposes of this division, appropriations made to the Department of Water Resources Electric Power Fund, and General Fund moneys expended by the department pursuant to the Governor's Emergency Proclamation dated January 17, 2001. (6) The administrative costs of the department incurred in administering this division."

> respect to the payment by retail end use customers for power sold by the department as do providers of power to such customers. (emphasis added)

Pursuant to this statute the Commission adopted a series of orders raising retail electric rates in March and April 2001 and apportioning revenues derived from electric sales among utilities and the department, including D.01-03-082 (raising rates), D.01-03-081 (apportioning revenues), D.01-05-064 (approving electric rate design that shields residential customers from certain rate increases.)

B. Suspension of Direct Transactions

Specifically with respect to the underlined portion of the statute, on September 20, 2001 the Commission issued D.01-09-060, setting the effective date for suspension of the right of customers to acquire service from providers other than DWR and the utilities at September 20, 2001. By that date, DWR had expended more than $9 billion in public funds providing electric service to utility customers, and had obligated the State to more than $43 billion in long-term contracts for future deliveries of electric energy. A principal concern of the Commission when it issued D.01-09-060 was to assure a stable customer base for payment of these obligations. The Commission was also concerned to prevent shifting of cost responsibility between customers as the result of migration by certain customers from bundled service to DA after adoption of the retail electric surcharges.

In D.01-10-036, issued on October 10, 2001 as the Commission's order addressing applications for rehearing of D.01-09-060, the Commission reiterated its intention that any DA- related actions by utilities continuing DA service for their customers after the suspension date must relate only to pre-September 20, 2001 contracts and arrangements. D.01-10-036, footnote 10 and related text.

In D.01-09-060, we reserved for subsequent consideration certain matters related to implementation issues concerning the DA suspension.[9] Foremost among these was the question of when the suspension would be considered to have taken effect – on September 20, 2001, the date of the decision or on an earlier date. On January 14, 2002, we instituted the instant Rulemaking R.02-01-011 to consider the implementation issues. As an initial phase of that proceeding we issued D.02-03-055, which confirmed the September 20, 2001 suspension date. That decision proposed to adopt a cost responsibility surcharge (CRS) applicable to the bills of the existing DA customers, to accomplish the objectives of assuring DWR cost recovery and to prevent cost shifting among customers that could result from the migration of customers to DA after the bulk of the costs had been incurred in the form of state expenditures and binding legal obligations to purchase energy.

In D.02-03-055 the Commission articulated a general "standstill principle" pursuant to which it would provide some flexibility for DA customers to preserve their DA service while assuring that over-all DA load would not increase, consistent with the statute. The standstill principle was embodied in a set of twelve "rules" set out in the body of the order specifically governing utility and ESP conduct. These "rules" are:

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[9] (Id. at pp. 8-9; see also, Order Modifying Decision (D.) 01-09-060, and Denying Rehearing, As Modified [D.01-10-036, pp. 1-2 (slip op.)] (2001) ___ Cal.P.U.C. ___ (hereafter, "D.01-10-036").)

1. ESPs shall have provided by October 5, 2001 a list of names of all customers with direct access contracts in place as of September 20, 2001.
2. To submit an ESP list, or to submit DASRs for its accounts, an ESP must (1) have in effect a valid ESP / UDC service agreement as of September 20, 2001, and (2) ESPs serving small customers must have in effect as of September 20, 2001 valid Commission registration as required by law.
3. Master agreements between ESPs and certain entities (other than the customers or end users of record) whose terms and conditions allow specific customers to elect direct access in the future (through execution of individual implementing agreements with customers), entered into on or before September 20, 2001 do not qualify as agreements for direct access service with end use customers.
4. Customers and accounts are allowed to switch from one ESP to another after September 20, 2001.
5. No customer is allowed to add a new location to its direct access service after September 20, 2001.
6. No customer is allowed to add a new or additional account to direct access service if that account involves installation of additional meters after September 20, 2001 or would require a new DASR to be submitted after September 20, 2001.
7. Direct access residential and small commercial customers may move from one address to another within the UDC service area and continue to be served by the ESP serving them prior to the move.
8. Direct access contracts may be assigned after September 20, 2001 to either a new ESP, or to a new retail end use customer representing approximately the same load at the same location.
9. A customer who had direct access prior to September 20, 2001, but who became a bundled customer before

September 20, 2001 cannot return to direct access after September 20, 2001.

10. A direct access customer can change its identity (i.e., Jones Company to Acme Electronics) provided no other implementation restriction applies.
11. Community aggregators shall serve only direct access customers who chose community aggregation prior to September 20, 2001.
12. Returns to Bundled Service and Backbilling.

These "highlighted" statements were specifically adopted as part of the Commission's order by Ordering Paragraph 8. D.02-03-055, page . In general they freeze the complement of ESPs at September 20 (Rule 2) and freeze the complement of DA customers and accounts at September 20 (Rules 1, 3, 5, 6 and 9). They do not abrogate or suspend the operation of "contracts in place" on September 20, 2001. Within the frozen complements of customers, accounts and ESPs as of September 20, changing ESPs by customers and accounts is permitted under certain circumstances. (Rules 4, 7, 8 and 10; and see, Findings of Fact 14 and 15, Ordering Paragraphs 2 and 8. See below, pages).

Among other things, the decision also purported to adopt an exception to the suspension order contained in D.01-09-060 by permitting contract renewals and assignments whereby DA customers could choose a new ESP and continue in a DA arrangement after September 20, 2001, even if they had terminated DA service by returning to bundled service after September 20, 2001. The language embodying this concept is found under Rule 4. D.02-03-055, p. 21, and is referred to as the "switching exception" in D.02-04-067.

C. Rehearing on Continuation issues

The Utility Reform Network (TURN) filed an application for rehearing of D.02-03-055, arguing that the "switching exemption" was unlawful and challenged its basis. (TURN's Application for Rehearing, pp. 6-7.) In D.02-04-067, the Commission granted rehearing on this issue, and directed that the issue be made part of the phase of this proceeding addressing the DA cost responsibility surcharges (CRS).

The rehearing was granted in order to consider the "switching exemption" further in light of AB 1X and D.01-09-060, and to develop an adequate record. Pursuant to D.02-04-067, an ALJ ruling issued on May 2, 2002, directing parties to address the switching exemption issue within the scope of the evidentiary hearings scheduled on DA cost responsibility issues in this proceeding. Accordingly, parties addressed the switching exemption as part of the opening testimony on the DA CRS submitted on June 6, 2002, and reply testimony submitted on June 20, 2002. Evidentiary hearings were held from July 11 through July 24, 2002, which included the issue of the switching exemption. Post-hearing opening briefs were filed on August 30, 2002, and reply briefs were filed on September 6, 2002. In D.02-11-022, establishing the DA CRS, consideration of the switching exemption was deferred to today's order.

Active parties in this phase of the proceeding represented a range of interests including the investor-owned utilities: Pacific Gas and Electric Company and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E); parties representing some classes of bundled service customers (i.e., Office of Ratepayer Advocates (ORA) and TURN); and parties representing DA customers, either through industry associations or as individual customers. The most active parties representing DA interests include the Alliance for Retail Energy Markets and the Western Power Trading Forum (AReM / WPTF), California Large Energy Consumers Association (CLECA), California Industrial Users (CIU), and California Manufacturers & Technology Association (CMTA). Other DA parties presented testimony or filed briefs.

D. Policy Considerations – Recovery of DWR Costs

The Commission's primary responsibility to assure recovery of DWR costs was made more complicated by the Commission's delay in implementing the suspension of direct transactions. As the Commission noted in D. 02-03-055, DA customers flocked to utility / DWR bundled service during January and February 2001, when the shelter of the statutory rate freeze was still in place for retail customers. On March 27, 2001 the Commission approved a 3-cent surcharge on retail rates, to take effective in June billing cycles. D.01-03-082. The Commission initially proposed to implement the Legislature's directive to suspend DA as of July 1, 2001.[10] The Commission did not take that action.

After the FERC order of June 19, 2001[11] and the imposition of the Commission's 3-cent surcharge on retail rates,[12] customers migrated back

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[10] The Proposed Decision (PD) of Administrative Law Judge Robert Barnett was mailed on June 15, 2001. It was set for decision on June 28, 2001.

[11] Order on Rehearing of Monitoring and Mitigation Plan for the California Wholesale Markets, Establishing West-wide Mitigation, and Establishing Settlement Conference, issued June 19, 2001. 95 FERC para. 61,418.

[12] D.01-03-082 (March 27, 2001); D.01-05-064 (May 14, 2001). The rates were to take effect on June 1, 2001 for PG&E and June 3, 2001 for SCE. D.01-05-064, Ordering Paragraph 1.

to DA and DA load increased rapidly until the Commission's suspension on September 20, 2001. D.02-03-055, page 8, Chart 1. By delaying the suspension, the Commission created a large group of customers who had taken utility / DWR service and who had thereby been the beneficiaries of frozen retail rates and DWR procurement activities, but who would not be paying the costs as reflected in elevated retail rates if permitted to remain DA customers.[13]

In D.02-03-055 the Commission was concerned to provide for appropriate and timely recovery of DWR costs when it confirmed the delayed suspension date. In lieu of a suspension when the matter was first placed before the Commission for Decision in June 2001, the Commission majority promised promptly to establish a surcharge for DA customers, one that would assure that they paid their fair share of the costs of serving them during the time they were on bundled service during the height of the energy emergency. The Commission said:

> For all of these reasons, we find that California is better served by maintaining the September 20, 2001 direct access suspension date and considering a direct access surcharge or exit fee, in lieu of an earlier suspension date, to recover DWR costs from direct access customers. Based on the comments, we believe that such a surcharge or exit fee is a viable option and a more moderate alternative to an earlier suspension….
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> We emphasize that <u>the direct access surcharges or exit fees to be developed in A.00-11-038 must alleviate any significant cost-shifting</u>, and must be adopted in a timely manner, in order to ensure an overall equitable outcome. Should either of these

[13] One estimate of the magnitude of this "free rider" effect for the 2001-02 period is $1.377 billion. Dissent of Commissioner Wood to D.02-11-022.

> conditions fail to develop, we will not hesitate to reopen this proceeding to reconsider the suspension date for direct access.

D.02-03-055, *Decision*, page 16, emphasis added.

In D. 02-11-22, rendered approximately eight (8) months after D.02-03-055, the Commission established the surcharge. In that decision the Commission reiterated its determination that DWR costs be recovered in an equitable manner from all customers, including customers who continue utilizing direct transactions. The Commission said:

> We emphasized in D.02-03-055 that bundled service customers should not be burdened with the additional costs that would otherwise shift to them due to the significant migration of customers from bundled service to direct access between July 1, 2001 (the suspension date originally anticipated in the ALJ Proposed Decision) and September 21, 2001 (the suspension date adopted by the Commission).
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> We noted that, in lieu of an earlier suspension date, DA surcharges must be considered as a means of preventing cost-shifting and the development of these surcharges must be timely. We later clarified that prevention of cost shifting meant that "bundled service customers are indifferent."[7] Should timely implementation of such charges fail to occur, we stated in D.02-03-055 that the proceeding would be reopened to reconsider the suspension date for DA.

D.02-11-022, *Decision*, footnote 7 and related text.

D.02-11-022 offered a significant subsidy to DA customers by creating a cap on the level of the CRS that reduces their payments for DWR costs, utility procurement costs, and utility / QF contracts[14] below the level

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[14] Pursuant to PU Code sections 367(a)(2) and 368, added by AB 1890 (Brulte), the costs of utility generation-related obligations not recoverable in the market price are to be recovered over the life of the contract from all utility customers.

required to defray the costs of the service provided to them and/or procured on their behalf.[15] The cap requires bundled service customers to pay several billion dollars of DA customers' costs during the period between July 1, 2001 and 2008.[16] That subsidy is an attractive inducement for customers who have elected to take bundled service to "switch" to DA if we permit it, leaving the less fortunate bundled service customers to pick up an even larger share of the DA customers' unrecovered cost responsibility.

This has created significant problems of discrimination -- subsidy of one class of electric customers by another – and fairness. These problems would only be exacerbated by permitting additional customers – not in an active DA relationship on or after September 20, 2001 -- to migrate to DA to take advantage of the favorable cost recovery treatment, or by permitting customers to remain on the subsidized rate indefinitely by establishing new DA contracts or arrangements after their current contracts or arrangements expire or otherwise terminate, including termination by returning to bundled DWR/utility service. As we discuss below, the statute does not permit it.

II. Implementing Direct Access Suspension under Water Code section 80110

The duty of the Commission in construing the statutory suspension of direct transactions is not in doubt. "The goal of statutory interpretation is to ascertain and effectuate the intent of the Legislature." Pacific Gas and Electric v. County of Stanislaus, 16 Ca. 4th 1143, 1152 (1997). The

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[15] D.02-11-022, *Decision*, page 109 ff. .

[16] D.02-11-022, Dissenting Opinion of Commissioners Wood and Lynch

Commission "'…has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.'" Stop Youth Addiction Inc. v. Lucky Stores Inc., 17 Cal. 4th 553, 578 (1998), quoting California Teachers Association v. Governing Board of Rialto School District, 14 Ca. 4th 627, 633 (1997). The "switching exemption" proposed by some parties constitutes a significant departure from the Commission's prior decisions and utility tariffs. If it is to be sustained, it must be on the basis of the satatutory language imposing the suspension.

A. Parties' Positions

TURN asserts that the "switching exemption" is contrary to law, and cites § 80110 of the Water Code which provides in relevant part:

> The department shall retain title to all power sold by it to the retail end use customers. The department shall be entitled to recover, as a revenue requirement, amounts and at the times necessary to enable it to comply with Section 80134, and shall advise the commission as the department determines to be appropriate…. After passage of such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with § 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers shall be suspended until the department no longer supplies power hereunder. (Emphasis added.)

TURN contends that by allowing a customer that has returned to bundled service subsequent to the September 20, 2001 suspension date to thereafter select a new ESP and resume DA service, the Commission violates the plain language of § 80110. TURN interprets the statute as directing the Commission to forbid any bundled service customer from selecting a new ESP after the suspension. TURN maintains that such an action constitutes acquiring service from another provider, and is precisely what the statute forbids. TURN argues that the law does not provide for a "standstill" in the amount of load on DA as of the suspension date, but absolutely bars a customer from acquiring service from another provider after the suspension date.

SCE agrees that DA customer migration in and out of bundled service should be curtailed and specifically advocates elimination of the switching exemption and/or a requirement that returning customers remain on bundled service for a full five years.[17] PG&E and ORA similarly propose restrictions on switching to protect bundled customers from cost shifting and to preserve DA customer choice, "assuming for the sake of discussion" that switching may be permitted. SDG&E believes it would be consistent with the Commission's "standstill" principle to approve the switching exemption. SDG&E offers a proposal to permit the switching exemption in a manner designed both to protect bundled service customers and maintain the viability of DA.

Other parties dispute the contention that acquiring service from a provider other than DWR after September 20, 2001, violates AB 1X. AREM argues that the prohibition on acquiring service from an ESP only applies to a new arrangement or agreement for DA. AREM contends that customers with a valid DA contract in place on or before September 20, 2001, had already "acquired" DA before the suspension took effect, and maintains that the renewal or assignment of such contracts under the switching exemption only involves the continuation of an existing contract right, rather than a new arrangement or agreement. Other parties

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[17] SCE Brief at pp. 51-52.

representing DA interests also oppose the elimination of the switching exemption, particularly if applied on a retroactive basis. Various DA parties argue that existing DA customers that have previously used the switching exemption should be grandfathered and entitled to retain DA service, or propose various methods to clarify how the exemption should be administered.

These parties argue that DA is an entitlement which a customer may enjoy at its election, so long as there is no increase in over-all DA load, notwithstanding the Legislature's directive that such "rights" be suspended by the Commission. Hence, a customer that was engaging in direct transactions or receiving service from an ESP on or after September 20, 2001 enjoys a "vested" right that cannot be affected by subsequent behavior, such as terminating DA and returning to bundled service. The basis for this contention is the logic, if not the law, of the "standstill" principle articulated in D.02-03-055.

B. Discussion

1. Introduction – The Issue

The "switching exemption" issue before us was precisely framed in D.02-04-067, our decision granting rehearing to TURN:

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> In D.02-03-055, the Commission creates an exemption to D.01-09-060 by permitting direct access customers to choose a new ESP and continue on direct access even if they had returned to bundled service after September 20, 2001, but subject to some restrictions. (D.02-03-055, p. 21.) We will call this exemption the "switching exemption".

> In its rehearing application, TURN argues that the "switching exemption" is unlawful and challenges the basis for this exemption. (TURN's Application for Rehearing, pp. 6-7.) After some consideration of TURN's arguments, we believe that a rehearing on this issue is warranted.

We address this issue seeking consistency with the statute and our prior decisions implementing the statute.

2. The Statutory Language

> …After passage of such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with § 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers shall be suspended until the department no longer supplies power hereunder….

In construing this language, the Commission is concerned primarily to ascertain the Legislature's intent, using the words of the statute themselves. "[The] first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." Mercer v. Department of motor Vehicles, 53 Cal. 3d 753, 763 (1991). The language of Water Code section 80110 clearly and unambiguously directs the Commission to set a date after which "the right of retail end-use customers pursuant to [statute] to acquire service from other providers" is "suspended" until DWR is no longer supplying power. By the express terms of the statute, the suspension is self-executing once the Commission sets the date. The statute does not authorize or require the Commission to suspend the right, nor does it authorize the Commission to qualify or limit the suspension. All that the Commission may do is determine a date after the enactment of AB 1X for the Legislature's suspension to take effect.

What the Legislature "suspended" is the "right" to "acquire service from other providers…." It is not the "right to acquire direct access service," or more accurately the right to engage in "direct transactions" as that term is defined by AB 1890.[18] It is the "right" to avoid DWR service. This language appears in a statutory section that deals specifically with the power supply costs and power sale revenues of the Department of Water Resources. The "right" that is suspended is the right of customers to avoid acquiring DWR electric energy through a direct transaction relationship with an ESP. TURN has read the statute correctly.

In construing the statute we must give effect to the legislature's intent in enacting the statute. In so doing, we may consider the "wider historical circumstances of its enactment." Pacific Gas and Electric v. County of Stanislaus, supra, at 1152. AB 1X was an emergency measure enacted rapidly in response to the Electricity Emergency of 2000-1.[19] It placed the State of California in the unfamiliar role of purchasing power for sale directly to retail customers. The findings section of AB 1X, Water Code section 80000, provides in pertinent part:

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[18] The following language from D.02-03-055 is apparently the basis for the "switching exemption:" "…While changing ESPs does require a new contract (absent assignment), prohibited by D.01-09-060 (Ordering Paragraph 7), an exception is appropriate for the reasons stated above. AB 1X can be read to allow ESP switches, and thus this exception, because it requires the suspension of the right to "acquire" direct access. A switch of ESPs is not an acquisition of direct access, but a continuation on direct access for the customer. See Water Code §80110." This statement is not supported by the text of water Code section 80110, which deals with DWR service and revenues.

[19] Section 7 of AB1X.

> 80000. The Legislature hereby finds and declares all of the following:
>
> (a) The furnishing of reliable reasonably priced electric service is essential for the safety, health, and well-being of the people of California. A number of factors have resulted in a rapid, unforeseen shortage of electric power and energy available in the state and rapid and substantial increases in wholesale energy costs and retail energy rates, with statewide impact, to such a degree that it constitutes an immediate peril to the health, safety, life and property of the inhabitants of the state, and the public interest, welfare, convenience and necessity require the state to participate in markets for the purchase and sale of power and energy.

The Legislature considered DWR's role to be temporary, and terminated power purchase and sale authority on December 31, 2002. Water Code Section 80260. The Legislature was concerned to assure recovery of DWR's costs, and to prevent parties from avoiding paying for those costs except as it directed. Water Code section 80104 provides:

> 80104. Upon the delivery of power to them, the retail end use customers shall be deemed to have purchased that power from the department. Payment for any sale shall be a direct obligation of the retail end use customer to the department.

Moneys paid by retail customers for DWR customers is property of DWR, Water Code section 80112, and is dedicated exclusively to payment of DWR power purchase and sale obligations. Water Code section 80200(b).

Payment by consumers for DWR energy is covered by section 80110, which has been previously quoted. This section requires the Commission to establish just and reasonable retail rates for DWR power that are sufficient to recover DWR's revenue requirement, which is in turn the security for bonds that DWR is authorized to issue to cover power costs.[20]

Our obligation in construing a statutue is, again, to "…ascertain the intent of the Legislature so as to effectuate the purpose of the law." Dyna-Med, Inc. v. Fair Employment and Housing Commission, 43 Cal. 3d 1379, 1386 (1987); California Teachers Association v. Governing Board, supra, at 632. The location of the direct access suspension in Water Code section 80110 must be considered in determining the Legislature's intent when it suspends the right of customers to avoid purchasing DWR power. Our orders must be consistent with this intent. It plainly runs contrary to the Legislature's intent to permit customers to avoid paying DWR's costs after the Commission has established the date for the mandated suspension.

3. Proponents of a Switching Exemption Ignore the Statutory Language

The plain and unambiguous language of section 80110 – the "right"… "shall be suspended" -- should be compared with schemes proposed by proponents of the "switching exemption." These schemes involve virtually toggling between utility / DWR service and "other providers."

CMTA proposes that DA customers be given a "safe harbor" for 90 days in order to find a new ESP and to have DASRs submitted to the

[20] Water Code section 80110 incorporates section 80134 by reference. This section establishes the categories of costs included in the revenue requirement to be recovered in retail charges established by the Commission. Section 80134 requires the DWR to covenant with bondholders that it will transmit these costs to the Commission for retail rate recovery.

utilities. As long as DASRs are submitted within the 90-day period, the customers would be free to return to DA service. Under CMTA's proposal, DA customers would pay the prevailing spot market price during the "safe harbor" period, plus all applicable generation-related surcharges that apply to DA customers. If the DA customer had no DASR submitted on its behalf within the 90-day period, CMTA proposes that the customer would be required to remain on bundled service for the next 12 months, and to pay the average generation rate for bundled service. The customer would remain responsible for its share of past surcharges that exceeded the rate cap.[21] Because the customer is not given unlimited access to the IOU portfolio at a favorable rate, CMTA argues that its proposal eliminates the possibility of customers "gaming" the market by switching from bundled service to DA service whenever spot prices are expected to be low, or vice versa, although apparently the customer could, under this view.

CLECA believes that DA customers returned involuntarily to the utility by the ESP, presumably through the ESP's exercise of its contractual rights, should retain the ability to return to DA service within a "reasonable" period of time, perhaps 60 days. Similarly, if a DA customer is in the midst of changing DA suppliers, and there is a minor delay in processing the DASR change, CLECA believes the customer should be able to use utility power for the interim and pay utility tariffed rates. CLECA believes these instances are highly unlikely to occur all at one time and contends that the very diversity of the occurrences will work to mitigate, if not virtually eliminate, any adverse impacts on the utility and bundled

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[21] Exh. No. 40 at 15.

customers. CLECA argues that the ability of current DA customers to switch suppliers should not be constrained by imposing restrictive coming and going rules that would merely give current ESPs inordinate and inappropriate leverage in the pricing of DA power. CLECA does not explain how "the ability of customers to switch suppliers" comports with the Legislature's determination to suspend the right to acquire service form other suppliers.

None of this is consistent with the legislature's simple termination of the right to acquire service from other providers while DWR is in the power supply role. It is not consistent with the simple regime established by our prior orders for utilities' handling of DA and DASRs, either.

4. The Commission's Prior Orders Implementing the Legislative Suspension – A Reasonable regime for Continuation

In its implementation of the Legislature's suspension the Commission has, nevertheless, preserved a reasonable degree of flexibility for customers to continue DA by its treatment of DA contracts, as will be explained below. To the extent that it creates an entitlement to engage in direct transactions pursuant to a new contract or arrangement after the suspension and after termination of DA service, the "switching exemption" and its progeny goes further than even a flexible approach to the statute permits.

The literal application of the statutory language would have terminated all direct transactions and the contracts and relationships on which they are based. The Commission was concerned, however, to provide for continuation of direct transactions if a customer had reasonable, realistic expectations based on a firm existing relationship.

The Commission has given effect to the reasonable expectations of parties to valid DA contracts existing as of September 20, 2001. The Commission has been quite consistent in its approach, as is apparent from a thorough reading of our decisions implementing the suspension.

The consistent, unwavering approach of the Commission for over 20 months reiterated in four separate orders places all customers and utilities on notice that the right to avoid DWR service through direct transaction has been suspended, subject only to execution of the express provisions of a pre-existing contract. No contrary rights or expectations have been acquired.

a. D.02-04-067

The "switching exemption" issue before us was first articulated in D.02-04-067, our decision granting rehearing to TURN:

> …In D.02-03-055, the Commission creates an exemption to D.01-09-060 by permitting direct access customers to choose a new ESP and continue on direct access even if they had returned to bundled service after September 20, 2001, but subject to some restrictions. (D.02-03-055, p. 21.) We will call this exemption the "switching exemption".
>
> In its rehearing application, TURN argues that the "switching exemption" is unlawful and challenges the basis for this exemption. (TURN's Application for Rehearing, pp. 6-7.) After some consideration of TURN's arguments, we believe that a rehearing on this issue is warranted.

The bald description of the "switching exemption" as an ability to acquire service from other providers after the suspension – notwithstanding the statutory language -- may have reflected the hopes of some parties. However, in D.02-04-067 the Commission restated its intention to permit continuation of DA only under limited and defined circumstances:

> …[R]enewals and assignments, if they were provisions in contracts entered into or agreements made prior to September 21, 2001, are not new contracts, agreements or arrangements, and thus, are permissible under the interpretation of AB 1X that we set forth in D.01-09-060.
>
> …. (D.02-04-067, page)

In footnote 3, the Commission refined this statement:

> Fn. 3. [W]e note that <u>if a renewal or assignment changes any material terms (e.g., load) in an existing contract or agreement</u> that was entered into before the suspension date, then the renewal or assignment would constitute a new contract or agreement that would be prohibited. Accordingly, in D.02-03-055, we limited the assignment to "the same load at the same location." (D.02-03-055, p. 23.) We intend that this same limitation apply to renewals. We will modify to D.02-03-055 to state that this limitation applies to a renewal. (D.02-04-067, page , emphasis added)

The Commission's note that any change in the material terms goes beyond the permissible continuation gives effect to the Legislature's intention to limit avoidance of DWR electricity service. Continuation of existing relationships does not include changes to material terms of the contract.

The legislative suspension of the right to avoid DWR costs has been understood by the Commission to permit continuation of DA where a pre-September 20, 2001 contract is in effect. A change in DA service that effects a change in material terms violates the suspension; a change that is authorized by the express terms of the contract can be made. A general right to switch ESPs and sign new contracts with new material terms does not comport with the statute.

The effect of the rehearing is to render the underlying order non-final. City of Los Angeles v. PUC, 15 C. 3d 680, 707 (1975). No rights or obligations were created with respect to the "switching exemption" discussion in D.02-03-055. The Commission's approach to suspension and continuation prior to D.02-03-055 was consistent with D.02-04-067. In fact a careful reading of D.02-03-055 demonstrates that it is consistent with its predecessor orders and the rehearing order in limiting the manner in which DA is continued following the suspension. The grant of rehearing on the "switching exemption" has the effect of leaving in place the orders of the Commission implementing the suspension, D.01-09-060 and D.01-10-036. City of Los Angeles, supra; Coast truck Line v. Asbury Truck Co., 218 C. 337, 340 (1933). No customer has acquired any rights or expectations in derogation of the statute or the Commission's prior orders.

b. D.01-09-60 and D.01-10-036

Our approach to implementing AB 1X has been embodied in a series of orders. In D. 01-09-060 we suspended direct access as of September 20, 2001. Our Ordering Paragraphs stated in pertinent part:

> …
>
> 4. The execution of any new contracts, or the entering into, or the verification of any new arrangements for direct access service pursuant to Public Utilities Code Sections 366 or 366.5, after September 20, 2001, is prohibited.
>
> 5. PG&E, SDG&E and SCE shall notify their customers that the right of retail end users to acquire direct access service

> from other providers, except the Department of Water Resources, is suspended effective as September 20, 2001.
>
> 6. PG&E, SDG&E and SCE shall modify any information disseminated to customers that describes direct access service, subject to review by the Public Advisor's office and Energy Division, to explain that the right to acquire direct access service has been suspended.[22]
>
> 7. PG&E, SCE and SDG&E shall not accept any direct access service requests for any contracts executed or agreements entered into after September 20, 2001.
>
> 8. Within 14 days of the effective date of this order, PG&E, SDG&E and SCE, by letter, shall inform the Director of the Energy Division of the steps they have taken to ensure that no direct access service requests are accepted for any contracts executed or agreements entered into after September 20, 2001.
>
> …

These orders are clear and unambiguous. They prohibit new contracts or arrangements and they prohibit the utilities from accepting or processing direct access service requests (DASRs) for new contracts or arrangements. Commissioners Duque and Bilas argued in dissent that "We are not convinced that the Department of Water Resources (DWR) bond ratings depend on killing direct access. This notion is a scare tactic and a smoke screen." They understood that the Commission majority meant what it said in ordering that "The execution of any new contracts, or the entering into … of any new arrangements for direct access service … is prohibited." The Commission was ending the creation of any new DA relationships after the suspension date.

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[22] Review of SDG&E's website indicates that SDG&E has not modified Rule 25 or its "For ESPs" link to conform to this order.

The Commission reiterated this conclusion three weeks later in D.01-10-036.

> In Decision (D.) 01-09-060, we issued an interim order, effective as of September 20, 2001, in which we suspended the right to enter into new contracts or agreements for direct access after that date, and reserved for subsequent consideration and decision matters related to the effect to be given to all contracts executed or agreements entered into on or before the effective date, including renewals of such contracts….

D.01-10-036, *Decision*, page 1.

The Commission explained that it was merely implementing the Legislature's suspension of direct transactions.

> …
>
> In D.01-09-060, we explained our reasoning and determinations for suspending direct access after September 20, 2001. Suspension was mandated by the Legislature, and it was enacted in response to the emergency declared by the Governor's Proclamation of January 17, 2001. (D.01-09-060, p. 3.) The Legislature left the determination of when direct access should be suspended to the Commission. (Water Code §80110.)

The Commission did not purport to abrogate any valid existing contracts. In D. 01-09-060 the Commission reserved the question of whether the effective date of the suspension would remain September 20, 2001, or be revised to take effect on July 1, 2001, the date proposed by the Proposed Decision that had been the basis for D. 01-09-060. D.01-10-36 confirmed this. The basis for this was that consideration of retroactivity issues was unripe. D.01-10-036, *Decision* at pp. 7-9.

However, the Commission also reiterated that going forward, only pre-existing contracts and arrangements would be continued.

> …we note that our clarifications today regarding the requirements for accepting DASRs should not be interpreted in any way to diminish or restrict the utilities' obligations, that we ordered in D.01-09-060, to take appropriate measures to ensure that any DASRs they do accept are for contracts executed or agreements entered into on or before September 20, 2001. We expect ESPs and other entities to cooperate with the utilities in their verification activities.

D.01-10-036, Decision, page .

c. R.02-01-011 and D.02-03-055

On January 9, 2002 the Commission issued the instant rulemaking, R.02-01-011. In the Rulemaking, the Commission placed the public on notice that "By opening this rulemaking notice is provided that the Commission may modify or alter previous Commission decisions or rulings regarding direct access, including, but not limited to D.01-09-060, as modified by D.01-10-036."

In D.02-03-055 the Commission addressed that issue. We discussed the principles underlying our approach to implementation of DA suspension as follows:

> Generally, we favor a balanced approach which allows existing direct access customers to continue in the direct access market, but limits additional load moving to direct access to load changes associated with normal usage variations on direct access accounts in effect as of September 20, 2001. This standstill concept is consistent with the provisions of AB 1X and D.01-09-060 that direct access be suspended and there be no new arrangements.

> Under the standstill approach described below, we will permit assignments and renewals, but not add-ons of new

> load. This approach is consistent with our policy reasons for imposing direct access cost responsibility surcharges or exits fees, in lieu of an earlier suspension date, as an appropriate way to alleviate the significant cost-shifting of DWR costs on to bundled service customers.

D.02-03-055, *Decision*, pp. 17-18

However, the Commission did not intimate that its policy preference would or could countermand either the statute or its prior decisions interpreting the statute. While generally expressing an intention to preserve a direct access option for customers already in the program as of the suspension date, the Commission majority reiterated the crucial Ordering Paragraphs of the prior decision:

> 2. The execution of any new contracts, or the entering into, or the verification of any new arrangements for direct access service pursuant to Public Utilities Code Sections 366 or 366.5, after September 20, 2001, is prohibited, unless specifically allowed on [sic] this decision.
>
> ....
>
> 4. SCE, PG&E, and SDG&E shall implement the conditions set forth in this decision which affect those direct access contracts not suspended.
>
> 5. SCE, PG&E, and SDG&E shall not accept any direct access service requests for any contracts executed or agreements entered into after September 20, 2001, unless specifically allowed by this decision

The Commission majority was completely clear about how the prohibition on "new arrangements" for direct access service would be carried out. In Finding of Fact 14 the decision stated with respect to pre-September 20 contracts:

> 14. It is reasonable to allow assignment or renewal of a direct access contract, if the assignment or renewal is permitted in the contract, and if [it] does not constitute a new contract or arrangement.

D.02-03-055, *Decision* at page 30 (emphasis added)

In Finding 15 the Commission majority also said:

> 15. Customers who signed a direct access contract as of September 20, 2001 may renew the contract, enter into a new contract with a different ESP for the same load, or may switch ESPs via assignment or other permissible mechanism. The filing of new DASRs to implement such changes is permissible.

D.02-03-055, *Decision* at page 30.

It is not difficult to reconcile these two statements. Finding 14 permits assignment or renewal only if the action is "…permitted in the contract, and if [it] does not constitute a new contract or arrangement." The phrase in Finding 15 "…enter into a new contract with a different ESP for the same load…" recapitulates Finding 14 and permits renewal or assignment if permitted in the pre-existing contract. It cannot be read to permit new contracts or arrangements unrelated to the pre-existing contract, because Ordering Paragraph 2 is clearly a prohibition on "new contracts" and "new arrangements." Finding 15 is not mere surplusage because the final sentence, authorizes the filing of new DASRs where the continuation arrangement is consistent with Finding 14.

The Findings and Ordering Paragraphs thus recapitulate what the Commission said it was doing in its rehearing decision, D.01-10-036, at page .

> …[w]e note that our clarifications today regarding the requirements for accepting DASRs should not be interpreted in any way to diminish or restrict the utilities' obligations, that we ordered in D.01-09-060, to take appropriate measures to ensure that any DASRs they do accept are for contracts executed or agreements entered into on or before September 20, 2001. We expect ESPs and other entities to cooperate with the utilities in their verification activities.

Some language in the text of D.02-03-055 does appear to diverge from both the Findings and the Ordering Paragraphs. Section 4 under the rubric "Implementation of Direct Access" provides:

> **4. Customers and accounts are allowed to switch from one ESP to another after September 20, 2001.**
>
> According to AReM allowing customers unlimited switching between ESPs is consistent with AB 1X since it doesn't increase direct access load. We agree. Changing ESPs would not be inappropriate under the standstill policy because no change in direct access load would occur, thus there would be no cost-shifting of DWR costs. <u>While changing ESPs does require a new contract (absent assignment), prohibited by D.01-09-060 (Ordering Paragraph 7), an exception is appropriate for the reasons stated above. AB 1X can be read to allow ESP switches, and thus this exception, because it requires the suspension of the right to "acquire" direct access. A switch of ESPs is not an acquisition of direct access, but a continuation on direct access for the customer. See Water Code §80110.</u> Customers can also choose a new ESP and continue on direct access if they returned to bundled service after September 20, 2001, except as indicated in Rule 12.

D.02-03-055, *Decision* at page 21.

However, Ordering Paragraph 8 of D.02-03-055 adopts only the highlighted portion of this discussion. Findings and Conclusions have an authoritative legal effect which statements obiter dicta lack because Findings and Conclusions permit reviewing courts to determine the basis for the Commission's decision. California Manufacturers' Association v. PUC, 24 C.3d 251, 259-60 (1979); California Motor Transport v. PUC, 59 C. 2d 270 (1963). Further, as discussed above, the underlined assertion is not consistent with the statute. OPs 2 and 8 and Findings 14 and 15 are thus consistent in allowing a continuation of direct access in those arrangements where such a continuation by assignment or renewal was anticipated in the express language of a direct access contract in effect on September 20, 2001. The terms of the Decision did not allow for the unlimited "switching exemption" argued for by some parties. The express terms of Findings and Orders cannot be avoided by dictum in the text, even if the Findings, Conclusions and Ordering Paragraphs had not so clearly omitted it.

This conclusion – that the suspension of direct access did not permit to any "switch" in the provider identity that was not permitted under the pre-existing contract -- was confirmed on rehearing by D.02-04-067, at page

> …[R]enewals and assignments, if they were provisions in contracts entered into or agreements made prior to September 21, 2001, are not new contracts, agreements or arrangements, and thus, are permissible under the interpretation of AB 1X that we set forth in D.01-09-060. (emphasis added)

d. The Effect of Returning to Bundled Service

The provisions of AB 1X relating to DA suspension prohibit us from adopting an approach that revives direct transaction for customers who have terminated that service by agreeing to take bundled service from their utility and DWR. The statute terminates the "right" to change providers, which occurred as of September 20, 2001. It does not matter whether the abandonment of direct transactions occurs before or after the suspension date. Once it has occurred, there is no longer any right to acquire service from "other providers' until DWR has finished its business under the statute.

In contrast, customers taking DA service pursuant to a valid written and executed contract in place on or before September 20, 2001 were acquiring service from a provider other than DWR and the utility. It does not contravene the statute to give those contracts their effect according to their terms. Allowing DA customers with valid contracts in place or customers verified per § 366.5 on or before September 20, to switch ESPs does not frustrate the Legislature's suspension of the rights of customers to avoid DWR service, where the contract specifically contemplates such action. What is suspended by the statute is the statutory right of the customer to acquire service, not the rights of two parties to a previously existing contract. However, as we were careful to point out in D.01-09-060 and to reaffirm in D.01-10-036 and D.02-03-055, the contract must have specifically provided for it, and the contract must not have terminated through a resumption of bundled service.

Some parties argue that DA is an entitlement which a customer may enjoy at its election, so long as there is no increase in over-all DA load, notwithstanding the Legislature's directive that such "rights" be suspended by the Commission. We disagree. AB 1X suspends the "right" of customers to acquire service from another provider – the definition of direct access. It avails nothing to rename this an "entitlement." Right, entitlement, privilege or option – the Legislature suspended direct access as of the date specified by the Commission.

Some proponents of a switching exemption argue that because DA customers did not know what Commission policies or surcharges would be adopted with respect to these matters at the time that they returned to bundled service, that is appropriate to offer them an option to return to DA without penalty for a limited window of time. This limited window will provide time for these "grandfathered" customers to determine what course they wish to pursue in view of D.02-11-022 and today's order. Such a course would permit these customers to speculate on the course of Commission policy. There is no reason to encourage such speculation.

III. Rehearing and Judicial Review

This decision construes, applies, implements, and interprets the provisions of AB 1X (Chapter 4 of the Statutes of 2001-02 First Extraordinary Session). Therefore, Pub. Util. Code § 1731(c) (applications for rehearing are due within 10 days after the date issuance of the order or decision) and Pub. Util. Code § 1768 (procedures applicable to judicial review of specified Commission orders) are applicable.

IV. Comments on the Alternate Decision

The Alternate Decision of Commissioner Wood was filed and served on parties on ___________. Comments on the Proposed Decision were filed on ________, and reply comments were filed on_________.

V. Assignment of Proceeding

Carl W. Wood and Geoffrey F. Brown are the Assigned Commissioners and Thomas R. Pulsifer is the assigned ALJ in this proceeding.

Findings of Fact

1. As part of its provisions to deal with California's energy emergency, AB 1X was enacted by the legislature which, among other things, suspended direct access.

2. D.02-03-055 did not change the DA suspension date of September 21, 2001, but created an exemption to the suspension requirements of D.01-09-060 (the "switching exemption") by permitting existing DA customers to choose a new ESP and continue on DA, subject to specified restrictions.

3. In D.02-04-067, the Commission granted a rehearing on the issue of the switching exemption, to be considered further in light of AB 1X and D.01-09-060, and so that an adequate record could be developed.

4. Parties presented testimony and briefs on issues relating to the switching exemption in this proceeding.

5. The Legislature's suspension of direct transactions of in AB 1X was intended to provide assurance that DWR power purchase costs would be covered by a stable customer base.

6. The suspension of direct transactions on September 20, 2001 in fact provides a stable customer base for the recovery of DWR costs.

7. If the DA customers depart bundled service without restriction, they potentially leave long-term supply commitments stranded, to be shifted to the remaining bundled service customers.

8. To the extent the utility must plan for the contingency that significant amounts of DA load may return to bundled service on short notice, its procurement costs will be impacted

9. In its Orders implementing the suspension of direct transactions the Commission has provided all customers with notice that direct transactions would be continued only pursuant to a valid existing contract.

Conclusions of Law

1. The Legislature suspended the right of customers to avoid receiving and paying for electric service from DWR on a date designated by the Commission as September 20, 2001 in Water Code section 80110.

2. The legal effect of the suspension was to terminate the right of customers to avoid receiving and paying for DWR power so long as DWR is providing that service.

3. Permitting the initiation of new arrangements for direct transactions after September 20, 2001 violates Water Code section 80110.

4. Sustaining the validity of pre-existing contracts pursuant to which a customer who was engaging in direct transactions prior to September 20, 2001 is consistent with water Code section 80110.

5. Permitting continuation of direct transactions after September 20, 2001 pursuant to the express terms of pre-existing contracts, including assignment and renewal where expressly provided for, is consistent with Water Code section 80110.

6. A switching exemption whereby new arrangements for direct transactions are initiated after September 20, 2001 is not lawful under the provisions of Water Code section 80110.

7. The “standstill” principle articulated in D.02-03-055 is consistent with the provisions of AB 1X only to the extent described in this Order.

8. This decision construes, applies, implements, and interprets the provisions of AB 1X (Chapter 4 of the Statutes of 2001-02 First Extraordinary Session).

9. Pub. Util. Code § 1731(c) (any applications for rehearing are due within 10 days after the date issuance of the order or decision) and Pub. Util. Code § 1768 (procedures applicable to judicial review) are applicable.

O R D E R

IT IS ORDERED that:

1. This order shall apply to Southern California Edison Company. Pacific Gas and Electric Company, and San Diego Gas & Electric Company.

2. Continuation of direct access service after September 20, 2001 for customers of Southern California Edison Company. Pacific Gas and Electric Company, and San Diego Gas & Electric Company, including renewal and assignment after September 20, 2001, shall be based on the terms of the direct access contract or arrangement in effect on September 20, 2001 between that customer and the electric service provider (ESP) identified in the customer's direct access service request (DASR) on file with Southern California Edison Company. Pacific Gas and Electric Company, and San Diego Gas & Electric Company, respectively, as of September 20, 2001, as provided in D.01-09-060, D.01-10-036 and D.02-03-055.

3. Southern California Edison Company. Pacific Gas and Electric Company, and San Diego Gas & Electric Company shall comply with

D.01-09-060, D.01-10-036 and D.02-03-055 by undertaking the following actions:

a. Review all direct access service requests (DASRs) filed after October 10, 2001;

b. Where DASRs have been processed that change the identity of the ESP, change delivery points, change load levels or billing determinants, or make any other material change, Southern California Edison Company, Pacific Gas or Electric Company, and San Diego Gas & Electric Company shall review the direct access contract in effect on September 20, 2001 to determine whether the change was expressly provided for in the contract.

c. If Southern California Edison Company, Pacific Gas and Electric Company, or San Diego Gas & Electric Company determines after such review that the change was not provided for in the contract, the affected utility shall calculate the amount representing payments for energy that the customer would have paid to the utility if the customer had been receiving bundled service.

d. Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company shall report the results of the review to the Commission within 60 days of the effective date of this order, and shall notify any affected of customers of the results of the review.

4. The utilities shall file advice letters within 15 days of the effective date of this order to implement tariff changes necessary to comply with the provisions of this order. In their advice letter filings to implement tariff changes, the utilities shall explain more specifically what accounting and tracking measures they propose to use to identify, and apply short-term commodity costs to the bills of DA customers temporarily returning to bundled service and to exclude such costs from bundled portfolio charges.

5. The schedule for the subsequent payoff of deferred undercollections shall be determined by the Commission after receipt of the report.

This order is effective today.

Dated ____________________________________, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached ***ORDER ADDRESSING CONTINUATION of ARRANGEMENTS FOR DIRECT TRANSACTIONS,Including the "SWITCHING EXEMPTION"ORDER DENYING ALBERTSON'S PETITION FOR MODIFICATION*** of Commissioner Wood as on all parties of record in this proceeding or their attorneys of record.

Dated April 8, 2003, at San Francisco, California.

/s/ SUSIE TOY
Susie Toy

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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